

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1180-CR

Cir. Ct. No. 2008CM452

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DRAGISA PAVLOVIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Dragisa Pavlovic appeals from convictions on two counts of misdemeanor bail jumping. He contends the evidence at trial was insufficient to convict him of those two counts. We disagree and affirm.

BACKGROUND

¶2 The State charged Pavlovic with battery, intimidation of a victim, and disorderly conduct related to a domestic violence incident between his wife and him (circuit court case No. 2008CM452). He was released on bond with the conditions that he was to have “[n]o contact with [his wife] or her residence.” Pavlovic was subsequently charged with three counts of bail jumping, alleging he violated his bond by “having contact with prohibited persons” “on or about Wednesday, July 23, 2008” (Count 1), “on or about Thursday, July 24, 2008” (Count 2), and “on or between July 25, 2008 and July 26, 2008” (Count 3) (circuit court case No. 2008CM1497). The two cases were consolidated for purposes of trial.² The following testimony from the court trial is relevant to Pavlovic’s sufficiency of the evidence arguments on appeal.

¶3 Pavlovic’s wife testified that she returned from Serbia in early July 2008, and, thereafter, she and her children (also Pavlovic’s children) were living with her friends in Chicago. She testified that, while they were living at this residence, Pavlovic called her approximately forty times. She reported these calls

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² When circuit court case Nos. 2008CM452 and 2008CM1497 were consolidated for trial, Counts 1, 2, and 3 in case No. 2008CM1497, the bail jumping charges, became Counts 4, 5, and 6 in case No. 2008CM452. Nonetheless, we refer to the three bail jumping charges at issue in this case as they were originally charged in case No. 2008CM1497—Counts 1, 2, and 3.

to the police because he “ke[pt] calling and calling.” She testified that Pavlovic had left “a lot of messages,” and specifically identified separate messages Pavlovic left related to leaving the country, taking \$300 from her account, taking the children to Oshkosh, and sending someone to pick up the children if she did not call him. At one point during the wife’s testimony, the prosecutor asked: “I thought we were speaking about July 23rd. You said you had some telephone messages.” The wife responded: “Yes. Oh, we talk about July 23rd, about the phone messages?”

¶4 An officer who spoke with the wife regarding the calls testified that she observed that the wife’s cell phone showed that Pavlovic had made two calls to his wife on July 24, 2008. The officer testified that Pavlovic left a message with the second call and that the message was left on the phone at 6:28 p.m. on July 24. The officer indicated that her meeting with the wife occurred shortly after Pavlovic had made the two July 24 phone calls to his wife. The officer further testified that when she spoke with Pavlovic, he admitted leaving a message for his wife on her phone and going to her residence in Chicago.

¶5 Addressing the time period when his wife and children were living in Chicago, Pavlovic testified that he had contact “via phone” and “left few messages.” He also acknowledged going to his wife’s residence in Chicago and “knock[ing] on the door.” He further admitted that he signed the bond which included the conditions “[n]o contact with [his wife] or her residence” and stated he understood those conditions.

¶6 The court found Pavlovic guilty on all six charges and he now appeals. Additional facts will be set forth as necessary.

DISCUSSION

¶7 As the State notes, Pavlovic did not raise his appellate issues before the trial court. We nonetheless consider them because sufficiency of the evidence challenges may “be raised on appeal as a matter of right despite the fact that the challenge was not raised in the circuit court.” *State v. Hayes*, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203. Whether trial evidence is sufficient to sustain a verdict is a question of law we review de novo. *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶8 In considering the sufficiency of the evidence,

[w]e cannot reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, “is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.”

State v. Bohannon, 2013 WI App 87, ¶30, 349 Wis. 2d 368, 835 N.W.2d 262 (citation omitted). The test is the same “whether the trier of the facts is a court or a jury.” *Krueger v. State*, 84 Wis. 2d 272, 283, 267 N.W.2d 602 (1978) (quoting *White v. State*, 45 Wis. 2d 672, 677-78, 173 N.W.2d 649 (1970)). An appellate court “must examine the record to find facts that support upholding the [fact finder’s] decision to convict.” *Hayes*, 273 Wis. 2d 1, ¶57.

¶9 Pavlovic does not challenge Count 2, acknowledging that trial testimony supported the finding that he had contact with his wife on July 24, 2008. He contends, however, that the evidence at trial was insufficient to convict him on Counts 1 and 3. We disagree.

Count 1

¶10 Count 1 of the complaint alleged in relevant part:

The ... defendant on or about ... **July 23, 2008** ... having been charged with a misdemeanor ... and having been released from custody under [WIS. STAT. ch.] 969 ... did intentionally fail to comply with the terms of his bond, *specifically by having contact with prohibited persons*, contrary to [WIS. STAT. §§] 946.49(1)(a), 939.51(3)(a). (Italics added.)

Pavlovic contends that the evidence at trial was insufficient to support a verdict based on this count, arguing that no evidence was offered showing he had contact with *his wife*, a prohibited person, on July 23, 2008, but rather that the evidence only related to Pavlovic's contact with her *residence*. The State contends that the probable cause section of the complaint made clear that the July 23, 2008 charge was because of Pavlovic's contact with his wife's *residence*, not with his wife. It relies on WIS. STAT. § 971.26 in essentially contending that use of the words "prohibited persons" in the charging language for Count 1, instead of "prohibited residences," was a mere defect in the form of the complaint and should not render the verdict invalid. We agree with the State.

¶11 WISCONSIN STAT. § 971.26 states: "No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." The probable cause portion of the complaint related to Count 1 states:

[Pavlovic's wife] reported that on **July 23, 2008** around 7:30 or 8:00 p.m., she received a call from Mr. Rick [a friend with whom the wife was staying]. Mr. Rick stated the defendant was at his home in Chicago, Illinois, pounding on the door. Mr. Rick called the police. Officers

from the Chicago Police Department arrived and informed the defendant he needed to contact an attorney....

Mr. Rick provided a statement to Officer Hoffman. He stated that at about 7:30 p.m., the defendant came to his residence ... in Chicago, Illinois, where Mrs. Pavlovic and her children are staying. His wife called him and stated she noticed the defendant's vehicle at another friend's home down the street and that the defendant is not to have contact with Mrs. Pavlovic. Several minutes later, the defendant showed up at Mr. Rick's front door and knocked. Mr. Rick stated he did not answer. The defendant then went to the back door and knocked again. This time, he knocked fairly hard. He then went to the front door and was yelling something. Mr. Rick stated the children were with him and were very nervous about the defendant being there. One child asked Mr. Rick to call the police. The defendant left prior to officer arrival. However, while officers were there, the defendant returned. Mr. Rick states the police told the defendant he could not come to this house nor see his children until he gained custody or visitation rights through the court.

Thus, the probable cause portion made clear that the charge related to the July 23, 2008 allegations was based only on Pavlovic's contact with his wife's residence, not with his wife.

¶12 Pavlovic has not claimed he was prejudiced by the incorrect charging language, nor could he successfully do so. First, as stated, the language in the probable cause portion of the complaint makes clear that Count 1 relates to his contact with his wife's residence, not his wife. Pavlovic has not suggested that he at any time raised any issue before the trial court regarding the discrepancy between the charging language and the probable cause section of the complaint. Further, during the State's opening statement and closing argument at trial, and discussion between the State, the defense, and the court preceding the court's oral ruling, the State made clear it was alleging that the bail jumping violation in Count 1 related to Pavlovic's contact with his wife's residence. We view the "prohibited persons" language in the charging section related to Count 1 as nothing more than

a defect in the form of the complaint. Since the defendant does not claim prejudice, and we can see none from our own review, in light of WIS. STAT. § 971.26, we will not reverse because of this defect.³ See *State v. Petrone*, 161 Wis. 2d 530, 554 n.14, 468 N.W.2d 676 (1991), *overruled on other grounds by State v. Greve*, 2004 WI 69, ¶31 n.7l, 272 Wis. 2d 444, 681 N.W.2d 479; *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564-66, 261 N.W.2d 147 (1978); *Lambert v. State*, 73 Wis. 2d 590, 601-02, 243 N.W.2d 524 (1976), *superseded by statute on other grounds*; *Craig v. State*, 55 Wis. 2d 489, 491-93, 198 N.W.2d 609 (1972); *State v. Gibson*, 2001 WI App 71, ¶¶15-16, 242 Wis. 2d 267, 626 N.W.2d 73; *State v. Slaughter*, 200 Wis. 2d 190, 193 n.1, 546 N.W.2d 490 (Ct. App. 1996); *State v. Wachsmuth*, 166 Wis. 2d 1014, 1026-27, 480 N.W.2d 842 (Ct. App. 1992).⁴

¶13 Pavlovic claims that the State is attempting to impermissibly “amend” the complaint on appeal, in violation of *State v. Duda*, 60 Wis. 2d 431, 210 N.W.2d 763 (1973). Nowhere in the State’s brief does it ask us to amend the complaint. Further, *Duda* has no application here. The question in *Duda* was

³ Pavlovic does not contend that the evidence at trial failed to show that he had contact with his wife’s residence; nor could he in light of his own testimony and that of the officer.

⁴ Even if we were to strictly hold the State to the “prohibited persons” charging language in Count 1, we would still find sufficient evidence to sustain the conviction. The wife testified to receiving around forty phone calls from Pavlovic while she was living at the residence in Chicago beginning in early July, and that, during this time frame, Pavlovic “ke[pt] calling and calling” and “left a lot of messages.” She specifically detailed the subject matter of multiple messages. Though the transcript shows a somewhat disjointed understanding between the wife and the prosecutor regarding precisely what the wife was testifying about at the time, at one point, the wife indicated that she was speaking “about July 23rd, about the phone messages.” While contact with the wife’s residence, not “prohibited persons,” was clearly the basis for the trial court’s finding of guilt related to Count 1, considering the above evidence, there was in fact sufficient evidence from which a reasonable fact finder also could have found Pavlovic guilty for having contact with a “prohibited person,” i.e., his wife, by phone “on or about” July 23, 2008.

whether a complaint could be amended after verdict to an entirely different charge under a different statute, from bribery of a witness to solicitation of perjury. *Id.* at 435. That is certainly not the case before us. Here, the charge remains the same, misdemeanor bail jumping; the charging language merely incorrectly specified the manner in which it was alleged Pavlovic violated his bail conditions, while the probable cause language and proceedings at trial made that clear.

¶14 We find no error in the conviction on Count 1.

Count 3

¶15 Count 3 alleges that Pavlovic made contact with his wife “on or between July 25, 2008 and July 26, 2008” in violation of his bond. Pavlovic complains that the evidence relied upon by the State in support of the conviction for Count 3 is one of the two phone calls he made to his wife on July 24, 2008, which obviously could not have been contact made “on or between” July 25 and 26, 2008.

¶16 This discrepancy is of no import. Our supreme court addressed this issue long ago stating: “The state is not formally tied to any date, but may, within reasonable limitations, prove the commission of the offense charged on any other [date] substantially corresponding with the date charged.” *Hawkins v. State*, 205 Wis. 620, 624, 238 N.W. 511 (1931). Even earlier, the court held that

unless some material right of the defendant is affected, as, for example, when such change might bring the alleged offense within some period of statutory limitation, the prosecution is not formally tied to any such date, and may prove the commission of the offense charged on some other day within a reasonable limitation.

State v. Hess, 174 Wis. 96, 99, 181 N.W. 725 (1921). The court reiterated this rule somewhat more recently, stating: “Generally, where time of commission of a crime is not a material element of the offense charged, it need not be precisely alleged.” *Blenski v. State*, 73 Wis. 2d 685, 696, 245 N.W.2d 906 (1976).

¶17 Pavlovic does not suggest the statute of limitations is at issue here, a situation *Hess* suggested might make material the use of a specific, but incorrect, date in a charging document. *Hess*, 174 Wis. at 99. Nor can we discern any argument by Pavlovic that the specific date of the offense was material other than his position that it was material simply because the State chose to identify a specific date in the charging language. Pavlovic does not explain how or why this is material, and, from our review of the record, we can discern no material or prejudicial impact upon Pavlovic by the State’s use of “on or between” July 25 and 26, 2008, instead of, for example, “on *or about*” or “on *or around*” those same dates.

¶18 The officer who testified at trial stated that she observed on the wife’s phone that Pavlovic made two phone calls to his wife on July 24, 2008. Pavlovic left a voice message during the second phone call, which was at 6:28 p.m., less than six hours before July 25. Further, we note that the State in *Hess*, like the State in this case, included a specific date of offense in the original charging document, but that the evidence later showed that the offense actually had been committed one week later. Nonetheless, our supreme court did not consider the error to be material. *See id.* at 96, 98 (alleging that the offense at issue occurred “on,” as opposed to, for example, “on or around” the specific date alleged). In fact, in the very supreme court case Pavlovic himself relies upon in arguing against Count 1, the court states that “variances in the complaint such as names and *dates*” are “technical variances.” *Duda*, 60 Wis. 2d at 440 (emphasis added).

Thus the discrepancy between the date used in the charging document and proof at trial is not material.

¶19 The trial court did not err in finding Pavlovic guilty on Count 3.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

